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IN THE SUPREME COURT OF THE UNITED STATES

October Term [redacted] 1970

No. 330

PAUL EDWARD SIMON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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COMES NOW your Petitioner, PAUL EDWARD SIMON, by and through his counsel, Philip M. Haggerty of the State of Arizona, and a Member of the Bar of this Court, and respectfully petitions this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review the decision of that Court in that cause entitled PAUL EDWARD SIMON, *Appellant*, vs. UNITED STATES of AMERICA, *Appellee*, No. 22678.

A. DECISION SOUGHT TO BE REVIEWED

The decision sought to be reviewed is entitled, PAUL EDWARD SIMON vs. UNITED STATES of AMERICA, No. 22678, United States Court of Appeals for the Ninth Circuit. It has not at the time of the printing of this Petition been reported. The text of the opinion of the court has been reproduced as Appendix A hereof.

B. GROUNDS UPON WHICH REVIEW IS SOUGHT

1. The opinion of the United States Court of Appeals was made and entered on March 30, 1970.

2. Petitioner's Motion for Rehearing was denied on May 4, 1970.

3. On May 18, 1970, the circuit court issued its order staying issuance of judgment herein until June 17, 1970.

4. Petitioner applied to this Court for an extension of time within which to file his Petition for Writ of Certiorari, and this Court by the Honorable William O. Douglas, Associate Justice extended the time for filing the Petition for Writ of Certiorari until June 30, 1970, by order of May 26, 1970.

5. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

C. QUESTIONS PRESENTED FOR REVIEW

I

Where no Federal Law prohibits the possession of marihuana *per se*, but requires that a person desiring to import marihuana either invoices or declares said marihuana in accordance with Customs laws or regulations, and where the invoicing or declaring of said marihuana would expose a person to criminal penalties under state law, is it not in violation of the Fifth Article of Amendment to the Constitution for the United States to charge, try and convict a person for importing marihuana into the United States of America without having invoiced or declared same?

II

Where there is no Federal Law prohibiting the bare possession of amphetamine, barbiturates or a codeine derivative known as Percodan pills or tablets, but the possession of same may be contrary to or violative of state law, is it not in violation an individual's rights under the same Article of Amendment to prose-

cute him for smuggling said tablets or pills into the United States where the declaration of or invoicing of said tablets or pills would expose the individual to prosecution under state law?

III

Is it not a violation of an individual's rights under the Eighth Article of Amendment to the Constitution for the United States to prosecute an individual for importing into the United States, "with intent to defraud" the United States, merchandise the value of which is not shown to exceed the amount allowed to be imported free of duty; and to sentence a person to two years in prison where it is not shown that the merchandise imported would have been subject to any duty, tariff or impost had said merchandise been declared or invoiced?

D. CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United Staes

Article of Amendment V.

No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *.

Article of Amendment VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Statutes

21 U.S.C. §176a

* * *[W]hoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, * * * shall be imprisoned not less than five or more than twenty years * * *.

18 U.S.C. §545

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, * * * [s]hall be * * * imprisoned not more than five years * * *.

State of Arizona Statutes

36 A.R.S. 1002

[E]very person who possesses any narcotic drug other than marijuana except upon * * * written prescription * * * shall be punished by imprisonment in the state prison for not less than two years * * *.

36 A.R.S. 1002.05

Every person who * * * knowingly possesses marijuana * * * shall be punished by imprisonment in the state prison for not less than one year * * *.

E. STATEMENT OF THE FACTS

On May 26, 1967, PAUL EDWARD SIMON, your Petitioner herein, accompanied by his wife Synthia Anne Simon, both American citizens, entered the United States from the Republic of Mexico through an established Port of Entry at Nogales, Arizona. Paul was driving the automobile, and his wife was in the back seat. There were no other persons in the vehicle. During a border search at the Port of Entry conducted by United States Customs officials 24 packages were discovered in the rear seat springs of the vehicle, each package containing marihuana. The inspection also revealed another package concealed under the dashboard containing the pills and tablets described as amphetamine, barbiturates and Percodan. Two pills and cigarette paper were found in a search of Paul Simon.

Following this Mr. & Mrs. Simon were indicted in the United States District Court of the District of Arizona on three counts, Count 1 alleging conspiracy between the Simons to violate 21 U.S.C. §176a; Count 2 with a substantive violation of 21 U.S.C.

§176a, involving the marihuana, and Count 3 with a substantive violation of 18 U.S.C. 5.15 involving the amphetamine, barbiturates and Percodan.

The case proceeded to trial in Tucson, Arizona before the Honorable James A. Walsh, United States District Judge, and a jury. At the close of the Government's case Count 1 was dismissed as to both Defendants and Count 2 and 3 as to Defendant Synthia Anne Simon. The Defendant Paul Edward Simon was convicted on Counts 2 and 3; sentenced to five years imprisonment on Count 2 and two years on Count 3, said term to be served concurrently with the sentence imposed in Count 2.

During the trial Customs official testified that Paul and Synthis Simon had been asked whether or not they had anything to declare when they entered the United States. The officials said that Paul Simon replied in the negative. Testimony also was to the effect that Paul Simon had stated that he was willing "to pay whatever tax is necessary." This statement was made purportedly after discovery of the marihuana, and the officials said they declined the offer because they had made the seizure.

Paul Simon took the stand, stated that he and his wife had been in Mexico as far south as Guaymas on the Gulf of California where his wife accidently burned her leg. He said he attempted unsuccessfully to obtain a physician's aid, were provided with a salve by a pharmacist and then returned to the United States for medical treatment. He denied any knowledge of the marihuana and further denied that he had made any offer to pay any tax.

F. QUESTIONS OF CONSTITUTIONAL LAW WERE RAISED PRIOR TO THIS PETITION

At the close of the Government's case the defense moved for judgment of acquital alleging among other things that "Section 176(a) of Title 21 of the U.S. Code is unconstitutional inasmuch

as it forces a person to incriminate himself. In this case Mr. Simon would be incriminating himself as to a potential violation of not only the United States Code, Section 4741, 26 U.S. Code 4741, 42, 43, 47, 44, and possibly Arizona Revised Statutes 36-100, unlawful possession of marihuana in the State of Arizona" (Transcript of Proceedings P. 118).

This same argument was made the second specification of error in the brief to the Ninth Circuit Court of Appeals, and following the decision in Leary v. United States, 395 U.S. 6, made the subject, at the Circuit Court's request, of supplemental memoranda.

H. ARGUMENT

Summary

Our principal argument to the Court is the one raised in *Marchetti v. United States*, 390 U.S. 39; *Grosso v. United States*, 390 U.S. 62; *Haynes v. United States*, 390 U.S. 85, and *Leary v. United States*, 395 U.S. 6. We believe that these cases stand for the simple proposition that the Federal Government may not require a person by statute to make a report or statement which report or statement would, in all likelihood lead to criminal prosecution, or in the alternative, prosecute that person for failing to make that statement or report.

In each of these cited cases, and in our case, a Federal statute required all persons engaged in the performance of a designated act to make a report to an agency (and in each case an enforcement agency) concerning that act. In none of these cases was the performance of this designated act, standing alone, prosecutable under Federal law. In all cases however state statutes prohibited the designated act and made its performance, with nothing more, a crime. In all cases also, the failure to make the report or declaration a federal offense.

Each time this issue has been presented to this Court, this Court has held that the federal statute requiring the making of

a report or declaration a crime forced the person involved to make a statement which could be used to incriminate that person and that therefore the federal statute, insofar as the making of the report would reveal a crime, was in violation of the Fifth Amendment to the Constitution, and that convictions thereunder for failure to declare or report such activity would be invalidated. *Marchetti, Grosso, Haynes, and Leary, supra.* While the statutes at issue herein are different, the principal of *declare or be convicted* versus *declare and be incriminated* are identical and we believe Mr. Simon's rights under the Fifth Amendment are as sacred as those of Messers. Marchetti, Grosso, Haynes and Leary.

We also believe that it is excessive, unusual and cruel punishment to send a person to two years in prison for failing to declare merchandise where there has been no evidence that the merchandise was dutiable to begin with and where the merchandise is not necessarily contraband.

The Requirement of 21 U.S.C. §176a That Marihuana Be Invoiced Prior To Entry Into The United States In Effect Requires A Person To Incriminate Himself Under State Law Although The Possession Of Marihuana Is Not Per Se A Federal Crime.

The actual language of 21 U.S.C. §176a is broad, but the specific offense for which Paul Simon was prosecuted related only to the failure to invoice (or declare) the marihuana. The jury was clearly instructed on this matter and was also instructed to the effect that government statutes require declarations or invoices at a Port of Entry.

"Under the law, all merchandise imported from any contiguous country must be presented to a Customs officer for inspection at the first Port of Entry at which the merchandise arrives. Further, certain information concerning the imported merchandise must be supplied to Customs officers and an invoice for the merchandise must be produced. A declaration under oath is required, which declaration states that the information contained therein, the invoice, and any other documents filed with the

Customs officials are true. It is entirely proper, for Customs officers to receive an oral declaration which is not necessarily under oath. This is the general Customs law as it is set forth in the United States Code.

"I instruct you that the marihuana referred to in Count II of the indictment in this case and the tablets and pills referred to in Count III of the indictment should have been invoiced prior to their introduction into the United States." (TP, pp. 159-160)

It was thus the government's theory of the case that if Paul Samon had declared the marihuana, or invoiced it at the border in Nogales, and then presumptively paid any tax or duty that might be due, no offense against the United States would have been committed. This is exactly that which would have happened in the case of Marchetti, Grosso, Haynes and Leary. However, in all of those cases, as in ours, there was a substantial danger that state prosecution would follow as the result of information being transmitted to state officers by federal officers who received the reports or declarations. We believe it would be ridiculous to assert that federal Customs officials would not know that it was a violation of the laws of the State of Arizona for an individual to possess marihuana. We believe at equally incredible to conceive that the federal Customs officers would allow such a violation of state law beneath their eyes to pass unreported.

In addition, at the time of this event, the provisions of the Federal Marihuana Tax Act were unchallenged, and the Customs officials, as employees of the Treasury Department would at least have the duty to report such a violation, if not to enforce it themselves. As this Court noted in *Leary, supra*, there are specific statutes relating to the exchange of information gathered under this act between federal and state officers. 26 U.S.C. 4774.

In short, it cannot be seriously doubted that the declaration, whether oral or by written invoice, of the possession of marihuana to Customs officials at a Port of Entry into the United States, presented a real and substantial danger of prosecution

under the laws of the State of Arizona prohibiting possession of marihuana, 36 A.R.S. 1002.05; despite the fact that neither bare possession of marihuana is prohibited by federal statute, nor is the importation of marihuana totally proscribed by federal law.

It may be argued by the Government that the actual indictment does not specifically set forth as a charge the fact that the marihuana was imported into the United States by Mr. Simon without being invoiced, but merely alleges that it was imported "contrary to law." We have pointed out however that the jury was specifically instructed that the law requires invoicing or declaration; and no other violation of law was alleged or proved.

The Disclosure Requirements Of 18 U.S.C. §545 Required Paul Simon To Incriminate Himself With Respect To The Importation Of Amphetamine, Barbiturates and Percodan.

Our argument here is essentially the same as that set forth with reference to 21 U.S.C. §176a. It is true that the smuggling act is of more long standing legal tradition than the marihuana act, but it is also true that the primary thrust of the law is directed towards disclosure.

It has been suggested that a holding such as the Petitioner urges herein would invalidate smuggling laws or in the alternative, invalidate laws regulating the illegal narcotic traffic. We believe that neither of these grim prospects is a reality. Smuggling laws are in enforcement of revenue laws, the revenues collected from customs duties, a longstanding form of governmental revenue. Customs duties are imposed on all merchandise of commercial value; merchandise which is at all times lawfully possessed by its owners. Since there is no danger that an importer can be charged with say the illegal possession of Danish furniture, the declaration of such furniture poses no danger of state or federal prosecution. Fifth Amendment arguments simply do not apply where the bare possession of the article is not a criminal offense.

Nor is the disclosure device the only way to control international illegal narcotic traffic. As we have pointed out, if Paul Simon had declared the marihuana, or invoiced it, the federal law would not have prohibited his bringing it into the country. A blanket importation prohibition would be as effective as the roundabout disclosure method now in effect. We do not see such insuperable obstacles barring adequate legislative draftsmanship that would argue the trampling of constitutional privileges as an absolute necessity and sole alternative.

Where The Amount Of Pills And Tablets Constituting Normals Medications Was Not So Large As To Imply Possession For Other Than Personal Use, And Where No Dutiable Value Was Shown Or Implied, A Two Year Prison Term Is Excessive.

Percodan was identified by the Government's expert as the trade name of a codine (sic) or opium derivative (T.P. 113). 27 tablets were found of this substance. It is not precisely how many amphetamine pills and how many barbiturate pills or how many combinations were found, but the total was 72. Customs laws and regulations allow an individual to bring into the country personal items of a value not to exceed $100 per person or $200 per family in any 30 day period. No testimony was offered as to the value of the Percodan, amphetamine or barbiturates, and we do not believe that any Court can assume that the pills or tablets were worth more than $1.00 each, or therefore that the total was more than $99.

We realize that under 18 U.S.C. §545 a person can be convicted for failing to declare a $1.00 pinata, and presenting the bill of sale or invoice for same, we have some problem in believing that the Government normally prosecutes individuals for failing to declare merchandise when there is no duty on that merchandise. The possession of the pills and tablets can in many cases be perfectly lawful, and they might have been lawfully obtained without a prescription in Mexico. They were apparently

regularly manufactured pharmaceutical preparations. Since there was no showing that the tablets or pills would ever have been subject to any tax or duty; and since the evidence suggests that they would not have been taxable, the government was certainly not actually defrauded, and the imposition of a two year sentence in prison seems extraordinarily excessive to the point where it constitutes cruel and unusual punishment.

CONCLUSION

It is respectfully submitted that the decision of this Court in *Lopez v. United States*, 373 U.S. 6 stands clearly for the proposition that, regardless of presumptions, the United States may not by statute force an individual to reveal facts which would subject him to state prosecution upon the threat of federal prosecution for failing to reveal those same facts. Nor should a conviction and sentence of two years' imprisonment be tolerated where no evasion or avoidance of any actual customs duty or tax was alleged or shown.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PAUL EDWARD SIMON,
Defendant-Appellant.

No. 22,678

[March 30, 1970]

Appeal from the United States District Court
for the District of Arizona

Before: BROWNING, ELY, and HUFSTEDLER,
Circuit Judges

PER CURIAM:

Defendant was convicted by a jury of importing marihuana and hashish contrary to law in violation of 21 U.S.C. §176a, and of importing amphetamines and barbiturates contrary to law in violation of 18 U.S.C. §545. He was sentenced to five years on the section 176a charge and two years on the section 545 charge, the sentences to run concurrently.

Defendant's contention that section 176a is unconstitutional because it deprives him of his privilege against self-incrimination is without merit. *United States v. Scott*, ... F.2d ..... (9th Cir. March 6, 1970) (in banc); *Witt v. United States*, 413 F.2d 303 (9th Cir. 1969).

Defendant also contends that it was error to instruct the jury in accordance with the second paragraph of section 176a, allowing the jury to infer from the fact of possession that the marihuana was imported contrary to law and that the defendant was aware that the marihuana was so imported.* The reference of knowledge of illegal importation was invalidated in *Leary v. United States*, 395 U.S. 6 (1969). In *United States v. Scott*, *supra*, we held that "where an instruction permitting the inference was given in a jury trial the conviction must be reversed "unless the giving of the instruction under the circumstances of this case was harmless beyond a reasonable doubt."

The uncontroverted evidence in this case is that in the course of a border search customs agents discovered 24 pounds of undeclared marihuana in packages taped to the springs of the automobile which defendant drove into the United States from Mexico.

The jury was instructed — correctly, of course, *see Evans v. United States*, 257 F.2d 121, 128 (9th Cir. 1958) — that the section 176a inference of illegal importation and knowledge of such illegal importation could be drawn only if the evidence established beyond a reasonable doubt that the defendant "knew he was in possession of the substance" and "knew it was marihuana."

Since it was uncontradicted that the marihuana was brought into the United States from Mexico without being invoiced or declared, and therefore "contrary to law", *see United States v.*

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* "Whenever on trial for a violation of this subsection the defendant is shown to have or to have had marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

The subsection cited is 21 U.S.C. § 176a, which reads as follows in pertinent part:

"Whoever fraudulently or knowingly imports or brings any marihuana into the United States, or assists in so doing, contrary to law, or knowingly conceals or facilitates the transportation, concealment, or sale of marihuana after it has been imported or brought into the United States contrary to law, shall be imprisoned . . ."

Scott, supra, ... F.2d at ....., defendant knew the marihuana was illegally imported if he knew of its presence.

Thus, in the circumstances of this case, proof of knowing possession, which was required before the jury could draw the statutory inference of guilt, established the elements of the offense without reference to the inference. The instruction was therefore functionless, and "harmless beyond a reasonable doubt."

This is unlike the situation in *Leary*. There the government advanced *two* theories to support the charge, one of which required reliance upon the statutory inference:

> "Under the first or 'South-North' theory, a conviction could have been based solely upon petitioner's own testimony that the marihuana had been brought back from Mexico into the United States and that with knowledge of that fact petitioner had continued to transport it. Under the second or 'North-South' theory, the conviction would have depended partly upon petitioner's testimony that he had transported the marihuana from New York to Texas and partly upon the challenged presumption." 395 U.S. at 31.

Defendant also attacks his conviction under 18 U.S.C. §545, but since the sentence on that conviction is concurrent with his conviction under 21 U.S.C. §176a, we do not consider the alleged error. *Pasterchik v. United States*, 400 F.2d 696, 702 (9th Cir. 1968).

Affirmed.